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No._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

H.G. GIBSON, J. SCOTT KENNEDY,
and GARY N. BANKS, *Petitioners,*

v.

THE BOEING COMPANY, a corporation;
THE NATIONAL TRANSPORTATION SAFETY BOARD
and JAMES KING, Chairman;
THE FEDERAL AVIATION ADMINISTRATION,
and J. LYNN HELMS, Administrator, *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH COURT

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QUESTIONS PRESENTED FOR REVIEW

This is a defamation action brought by three airline pilots against The Boeing Company for statements which blamed a near fatal six mile dive of a Boeing 727 on plaintiffs' unprofessional conduct. The pilots also made claims against the National Transportation Safety Board (NTSB) and Federal Aviation Administration (FAA) for damages under subsections (g)(1) (C) and (D) of the Privacy Act (5 USC §522a).

The questions raised by the summary judgments for Boeing and the government agencies are these:

1. Is the communication of "a written report to the NTSB," where it becomes a public record, protected by an absolute governmental immunity or privilege?

2. Is summary judgment as to the "malice" necessary to overcome a qualified privilege appropriate prior to any discovery being allowed plaintiffs and notwithstanding their pending, unanswered interogatories, document requests, and two affidavits of counsel invoking Fed R. Civ. P. 56(f)?

3. Are plaintiffs' claims under subsections (g)(1)(C) and (D) of the Privacy Act sufficient if they concern a "record" as defined in subsection (a)(4), or must such claims relate also to a "system of records" as defined in subsection (a)(5)? Also, does the failure of defendant agencies to incorporate investigation materials about this accident in the "system of records" they maintain for aircraft accident investigations bar this action?

4. Is the exercise of this Court's certiorari jurisdiction unreasonably burdened by successive summary dispositions which fail to elucidate important legal issues involved or deal adequately with a complicated state of facts which has given rise to a national controversy over air safety?

The caption of the case contains the names of all parties.

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No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1984

H.G. Gibson, J. Scott Kennedy and Gary N. Banks, petitioners

v.

The Boeing Company, The National Transportation Safety Board, James King, The Federal Aviation Administration and J. Lynn Helms, respondents

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioners, H.G. Gibson, J. Scott Kennedy and Gary N. Banks respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on April 9, 1984.

Opinions Below

The memorandum opinion of the United States Court of Appeals for the Ninth Circuit appears in the appendix to this petition (A 1) but is not and will not be reported under that Court's Rule 21(c) and the panel's finding. No opinion was rendered by the District Court for the District of Nevada. Its findings of fact and conclusions of law and grant of summary judgment thereon are set out in the appendix (A 9, A 17, A 18, & A 25)

Jurisdiction

The judgment of the Court of Appeals for the Ninth Circuit was entered April 9, 1984. A timely petition for rehearing and rehearing en banc was denied July 20, 1984. This Court, upon application filed herein on October 12, 1984 entered an order on October 18, 1984 extending the

time for filing a petition for writ of certiorari in this case to and including November 16, 1984. This Court has jurisdiction under 28 USC §2101(c).

Statutory Provisions Involved

Federal Aviation Act of 1958, Pub. L. 85-726, Title VII, §701, August 23, 1958, 72 Stat. 781, as amended by Pub. L. 87-810, 1, 2, Oct. 15, 1962, 76 Stat. 921, codified to 49 USC 1441 is set out in the appendix (A 81). Transportation Safety Act of 1974, Pub. L. 93-633, Title III, January 3, 1975, 88 Stat. 2166, codified to 49 USC 1901 et seq. is set out in the appendix (A 83). Privacy Act of 1974, Pub. L. 93-579, December 31, 1974, 88 Stat. 1897, as amended by Pub. L. 94-183, December 31, 1975, 89 Stat. 1057, codified to 5 USC 552a is set out in the appendix (A 93).

Statement of the Case

Petitioners, a professional flight deck crew employed by Trans World Airlines, allege in their complaint that on April 4, 1979 they were operating a Boeing 727 near Flint, Michigan. "Unexpectedly, and for reasons unknown to plaintiffs," the aircraft "fell from an altitude of approximately 39,000 feet in a spiral dive to near 5000 feet before plaintiffs were able to regain control and avert a crash which most certainly would have taken the lives of 82 passengers and a flight crew of seven" (A 29).

Controversy has raged around the cause of this near calamity ever since the crew safely landed their crippled aircraft at Detroit over four years ago. As recently as July 14 of last year CBS did an hour long documentary on "The Plane That Fell Out of the Sky."

A jury trial of the issues was prevented by entry of summary judgment for defendants last year in plaintiffs' then two year old lawsuit against Boeing, the NTSB and the FAA. No discovery had been permitted in the case up to that time, so the record for review is limited to the complaint, affidavits, exhibits, and the discovery requests plaintiffs were denied.

"The Plane That Fell Out of the Sky"--according to the complaint*

After reciting the circumstances of the spiral dive as set out above and the commencement of NTSB and FAA investigations, the complaint alleges "defendant NTSB turned over to an interested party, namely defendant Boeing, the conduct of

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*Although the complaint is not set out in the appendix to this petition, significant paragraphs are quoted in plaintiffs' excerpted interrogatories which are reproduced in the appendix.

most of its investigative and testing functions, knowing full well that said defendant had a strong economic and public relations incentive to shift any blame for the spiral dive away from themselves and onto the pilots of the aircraft." Boeing, the complaint goes on, "conducted its investigations and tests so as to support its claim that safety factors built into the 727 are so extensive that the spiral dive could not possibly have been precipitated by any mechanical or structural, manufacturing or design defect in its aircraft. To this end its investigation attempted to explain away, as causative factors, (1) all noticeable defects, damaged and defective parts discovered after the aircraft landed in Detroit; (2) laboratory tests...and (3) other technical defects and deficiencies too numerous to mention (A 32-33).

"Defendant Boeing then went beyond its assigned task as investigator of facts and scientific tests, and without waiting for all the evidence and tests to be finished, stated as conclusions: (1) The cause of the upset was some unauthorized cockpit procedure engaged in by the flight deck crew; (2) had the crew taken prompt and appropriate action after their aircraft began to roll, they could have regained control easily; and (3) the last second recovery from the spiral dive and prevention of a major air disaster was fortuitous and due to circumstances for which the crew was only minimally responsible" (A 33-34).

Alleged publications by Boeing agents

The complaint alleges that the foregoing assertions by Boeing "(1) were pub-

lished through its many agents, servants and employees, and in a written report to defendant NTSB where it became a part of the public record and widely circulated through official and aircraft industry channels and in the public media; (2) are false and based on theories unsupported by fact and discredited by tests; (3) were published with knowledge of their falsity or with reckless disregard for their truth, or negligently; (4) went beyond the scope of prescribed practice in NTSB and other accident investigations in that the stated conclusions were premature and amounted to a prejudgment before all the evidence was in; and (5) went beyond the purpose of the inquiry in that the conclusions were motivated by an attempt to side-track any meaningful investigation of the airworthiness of the Boeing 727, the most widely used commercial aircraft in

service today" (A 34-35).

Privacy Act allegations

The complaint alleges, paraphrasing the language of subsections (e)(6) and (g)(1)(C) and (D) of the Privacy Act (5 USC §522a), that defendant agencies failed to "maintain records concerning the individuals involved with such accuracy, relevance, timeliness, and completeness as is necessary to assure the fairness of any determination relating to the qualifications, character, rights or opportunities of, or benefits to, the individual that may be made on the basis of such record." In consequence, defendant FAA, "determined and published through official and aircraft industry sources and to the public media, the groundless assertion that plaintiff had intentionally erased the cockpit voice recorder in order to conceal

information about their conduct respecting the spiral dive" (A 43).

Similarly, influenced by their own improperly maintained records, defendant NTSB "determined and published through official and aircraft industry sources and to the public media" Boeing's groundless assertions of crew responsibility for losing control of the aircraft they were piloting (A 45-46).

Discovery sought and suspended

A few months after commencement of this action, plaintiffs served a number of interrogatories and document requests on defendants which inquired, for the most part, about specific allegations of the complaint and answer (A 29-48).

Shortly thereafter, the Court issued an order (A 26-27) suspending Boeing's obligation to respond to plaintiffs' out-

standing interrogatories and document requests until 30 days after disposition of the "motion to dismiss" Boeing planned to file. Plaintiffs had agreed to this suspension upon the written representation of Boeing's counsel that the intended motion "raises legal issues unrelated to the discovery requested of my client" (A 64).

Boeing's proposed "motion to dismiss" became a "motion for summary judgment" when it was filed. Its stated grounds were limited, however, to the defense of "absolute privilege" for its "written report to defendant NTSB" which it attached to its motion together with affidavits showing its transmittal and receipt. Plaintiffs responded, treating the motion as one to strike that claim only (A 66).

To illustrate, without benefit of discovery, some of the disputes which revolved around the "Boeing report," plain-

tiffs filed a then recent article from a professional journal which reviewed, in summary form, the history of the Flight 841 investigation (A 49).

Boeing then filed a reply memorandum, and with it "proposed findings of fact and conclusions of law" which greatly expanded the breadth of its summary judgment motion. Most notably, it proposed that the Court find in its favor "whether the privilege is considered absolute or conditional" (A 15, 67-68).

Faced with this radical expansion of issues, plaintiffs filed an affidavit of counsel under Fed. R. Civ. P. 56(f) explaining in detail why plaintiffs could not respond to defense affidavits without discovery (A 64).

When the summary judgment motion finally came on for hearing some fifteen

months later--the delay being caused entirely by Court-initiated postponements (A 77-78)--plaintiffs' counsel reexecuted and refiled the same Rule 56(f) affidavit three days before argument (A 75).

A few days thereafter, the District Court endorsed the findings of fact, conclusions of law and summary judgment proposals submitted by defendants with no change other than striking out the word "proposed." Defendants' proposals, having been submitted some seventeen months earlier, before either of the Rule 56(f) affidavits were filed, took no notice of them nor of the plaintiffs' outstanding discovery requests (A 9-25).

REASONS FOR GRANTING THE WRIT

1. The failure to apply fundamental distinctions between absolute and quali-

fied immunities[1] to the investigative role of the National Transportation Safety Board is a disservice to that important federal news making agency and the many segments of the public who deal with it constantly.[2]

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[1]Absolute immunities of officials other than the President of the United States "extend only to acts in performance of particular functions." Nixon v. Fitzgerald __ U.S. __, 73 L. Ed. 349, 363, 367 (1982). "Moreover, in general, our cases have followed a 'functional' approach to immunity law. We have recognized that the judicial, prosecutorial, and legislative functions require absolute immunity. But this protection has extended no further than its justification would warrant." Harlow v. Fitzgerald __ U.S. __, 73 L. Ed. 396, 406 (1982).

Qualified immunity is the norm for executive officials generally, including governors and members of the President's cabinet. Harlow v. Fitzgerald, __ U.S. __, 71 L. Ed. 396, 403 (1982); Butz v. Economu, 438 U.S. 478, 508 (1978).

[2]The Court of Appeals was concerned, however, with pleading diversity of citizenship as a paraphrase of the Fourteenth Amendment ("a citizen of the United States and a resident of the State of Nevada") instead of in the conclusory language of

(footnote 2 continued on page 17)

The NTSB is an anomaly among federal agencies; for its accident investigation function is concerned solely with public advocacy of transportation safety, a matter over which it exercises no adjudicatory or rule making authority.

49 USC §1903(a)(1) authorizes the Board to "investigate or cause to be investigated...and determine the facts, conditions, and circumstances and the cause or probable cause or causes of any...aircraft accident" or other transportation

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[2](continued)
Fed. R. Civ. P. form 2(a). This concern found its way into the Court's memorandum (A 1-2). "Standing alone, an allegation that a party is a resident of a certain state is not a sufficient allegation of his citizenship in that state" (empahsis added), Delome v. Union Barge Line Company, 444 F.2d 225 at 233 (5th Cir. 1971); but coupled with United States citizenship, it meets the state citizenship test of the Fourteenth Amendment and confers diversity jurisdiction. Maple Island Farm v. Bitterling, 196 F.2d 55 at 57-58 (8th Cir. 1952), a case argued successfully by Warren E. Burger, the present Chief Justice.

accident (A 86). In subsection (a)(2) it is authorized to "report on the facts, conditions and circumstances of each accident...and cause such reports to be made available to the public" (A 87)[3]

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[3]In subsection (a)(3), NTSB is directed to "issue periodic reports" to other government agencies and interested persons "recommending and advocating meaningful responses to reduce the likelihood of recurrence of transportation accidents similar to those investigated by the Board...." The remaining paragraphs of subsection (a), insofar as they relate to accident investigations, list similar recommending activities and in paragraph (6) the NTSB is authorized to "establish by regulation requirements binding on persons reporting accidents subject to the Board's investigatory jurisdiction under the subsection." The Federal Aviation Act of 1958, as amended (A 81), confers almost identical functions on the NTSB in 49 USC §1441(a).

In aid of these purposes (and some others unrelated to accident investigation), the Board, under 49 USC §1903(b)(1), may delegate its authority to any Board member, administrative law judge, officer or employee. Persons so delegated may hold hearings, administer oaths and require the attendance of witnesses and production of documents by subpoena "as such officer or employee deems advisable" (A 88).

But the NTSB adjudicates no rights and promulgates no rules in connection with the exercise of its accident investigation functions. Its determination of "probable cause" has no legal or administrative consequences and under 49 USC §1441(e) and 1903(c) is not even admissable in evidence in any other proceeding (A 90). NTSB recommendations for improvement in air safety regulations have no authority beyond their persuasiveness to the Secretary of Transportation--the responsibe air safety rule making agency under 49 USC §1421 et seq.--who is entirely free to accept or reject NTSB suggestions. 49 USC §1906 (A 92). Thus NTSB "determinations" are essentially "publications" by an agency having no function beyond reporting the results of what is presumably its own independent investigation.

In furtherance of this purpose, it has

an affirmative duty under 49 USC §1905 to make available to the public, subject to certain limited exceptions, "Copies of any communications, document, investigation, or other report, or information received or sent by the Board, or any member or employee of the Board" (A 91).

Ever since the NTSB was established by the Department of Transportation Act of 1966,[4] it has exercised its recommending function with respect to accident investigations side by side with certain quasi-judicial functions it inherited from the old Civil Aeronautics Board.[5]

Impressed by CAB's "quasi-judicial and

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[4]Act of October 15, 1966, Pub. L. No. 89-670, 80 Stat. 931.

[5]Thus it reviews on appeal, under 49 USC §1903(a)(9)(A), licensing certificate decisions of the Secretary of Transportation; and, inherited from other sources, under 49 USC §1903(a)(9)(B), it reviews appeals from licensing decisions by the Commandant of the Coast Guard (A 88).

quasi-legislative powers" respecting the economic regulation of air carriers, a New York trial court in 1964 held in Loudin v. Mohawk Airlines, Inc.[6] that a witness at a public hearing on the cause of an aircraft accident before the Civil Aeronautics Board was protected by an absolute privilege. The Court failed to notice, however, that CAB's accident investigation function was no longer related to any air safety rule making authority after the Federal Aviation Action of 1958 transferred that responsibility to the newly

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[6]44 Misc. 2d 926, 255 NYS 2d 302 (S. Ct., N.Y. County, 1964), modified, 24 AD2d. 447, 260 NYS 2d 809 (S. Ct., Appellate Division, First Department, 1965), on remand, 58 Misc. 1035, 297 NYS 2d 630 (where it is pointed out, 297 NYS 2d at 632, that the claimed defamation was based on sworn testimony of a witness at a public hearing).

formed Federal Aviation Administration.[7]

The absence of a functional analysis in Loudin has caused it to drop out of sight in subsequent decisions. Loudin was described by the Supreme Court of Washington (the highest court of defendant Boeing's home state) as "one isolated case" which, in 1966, it refused to follow in Engelmohr v. Bache.[8] There it was held that a witness before an administrative body appointed by the Securities and Exchange Commission to study rules governing national securities exchanges did not have the benefit of absolute privilege. The Court explained, "We do not want to depart from the established policy in this country."

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[7]Act of August 23, 1958, Pub. L. 85-726, 72 Stat. 731, §701, House Report No. 2360, 1958 U.S. Code Cong. & Adm. News, p. 3746-3748.

[8]66 Wash. 2d 103, 401 P.2d 346, 348 (1965), cert. denied 382 U.S. 950.

Engelmohr v. Bache has since been followed in Virginia (1967),[9] Maryland (1981),[10] and most recently in Nevada (1983).[11] Its principle has found its way into the 1977 Restatement of Torts 2d, Comment e to §598:

> Testimony offered before investigating committees, commissions and other bodies properly authorized to conduct investigations is conditionally privileged unless the investigation is a judicial or a legislative proceeding, in which case the testimony is absolutely privileged....

Into which of these categories do NTSB proceedings fit? Mass media coverage of transportation disaster investigations--or near disasters such as here involved--gives daily emphasis to the importance of

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[9]Elder v. Holland, 208 Va. 15, 155 SE 2d 369 (1967).

[10]Gersh v. Ambrose, ___ Md. ___, 434 A.2d 547 (1981).

[11]Knox v. Dick ___ Nev. ___, 665 P.2d 267, 270 (1983).

an authoritive answer to this now unsettled question.

2. To the extent that the ruling below may be said to rest on the establishment of a qualified immunity or privilege, it fails to meet the special standards of appellate review respecting determinations of "malice" in defamation cases recently announced by this Court in Bose Corp. v. Consumers Union of U.S., Inc. ___ US ___, No. 82-1246, decided April 30, 1984.

Also involved is the applicability of the "malice" standard in a non-media defamation case now pending before the Court in Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., No. 83-18, to review the holding of the Supreme Court of Vermont sub nom. Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc., 46 A.2d 414 (1983).

Is the "independent examination of the whole record" mandated by Bose excused by

petitioners' alleged inaction in pressing their discovery demands during "the lengthy time between Boeing's motion for summary judgment and the hearing on the motion" (A 6)?

Traditionally, and in the Ninth Circuit, the effect of filing a motion for summary judgment is to suspend the "general right to discovery," and until such motion is resolved, discovery may be pursued by a party, according to Rule 56(e), only to the extent that the "court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories or further affidavits" (emphasis added).[12] The appropriate way to seek permission for discovery during the

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[12]Timberlane Lumber Co. v. Bank of America, 549 F.2d 597, 602 (9th Cir. 1976); United States v. Johns-Manville Corporation, 237 F. Supp. 893 (E.D. Pa. 1965).

pendency of a summary judgment motion is by filing a Rule 56(f) affidavit, although some courts, including the Ninth Circuit, sometimes allow Rule 56(f) discretion to be invoked by motion.[13] Although a Rule 56(f) affidavit is not a motion (as the Court's memorandum describes it), filing it has the effect of invoking the full range of the court's discovery discretion under Rule 56(e):

> The District Court, by the terms of Rule 56(f), [has] the options of refusing to grant summary judgment, ordering a continuance to permit affidavits to be secured or discovery to be conducted, or entering 'such other order as [is] just'.[14]

Since the chief impediment to a response on the merits according to the affidavit here involved was the stipulation and

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[13]Program Engineering, Inc., v. Triangle Publications, Inc. 634 F.2d 1188, 1193 (9th Cir. 1980).

[14]Londrigan v. FBI, 670 F.2d 1164, 1175 (D.C. Cir. 1981).

order suspending Boeing's obligation to respond to pending interrogatories and document requests (A 71)--on the precise issues upon which it was seeking summary judgment (A 33-37)--an order permitting "discovery to be conducted" on these issues was plainly the relief plaintiffs sought.[15] A separate motion, seeking this same relief, would not only be redundant; it would encourage a practice specifically disapproved.

When it appears on a Rule 56(f) ap-

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[15]The affidavit stated (A 71-72) "Plaintiffs are therefore unable at this time, without discovery, to present by affidavit or otherwise facts essential to justify their opposition to defendants' motion[s] for summary judgment" (emphasis added). After outlining specific issues that needed development (A 72-73) it concludes, "plaintiffs respectfully request the court not to try this case on affidavits, deny the pending motions for summary judgment and set the case down for trial on the merits at the earliest opportunity after completion of discovery" (A 74, emphasis added).

plication that answers to interrogatories "might be relevant" to the issues on a pending motion for summary judgment, a stay order making it unnecessary to answer them must be vacated and the applicants "allowed further discovery."[16] "A defendant who has failed to answer relevant and timely interogatories is, as least normally, in no position to obtain summary judgment."[17]

Of course, a different case would be presented if plaintiffs had been dilatory in pursuing discovery. But the record in this case affirmatively establishes plain-

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[16]Handi Investment Co. v. Mobil Oil Corp.,, 550 F.2d 543, 547 (9th Cir. 1977). See also Washington v. Cameron, 411 F.2d 705, 710, (D.C. Cir. 1969).

[17]Bane v. Spencer, 393 F.2d 108, 109 (1st Cir. 1969) cert. denied 400 U.S. 866. The same is true of document requests. Parrish v. Board of Commissioners, 533 F.2d 942, 948 (5th Cir. 1976) cited with approval in Texas Partners v. Conrock Co., 685 F.2d 1116 at 1119 (9th Cir. 1982).

tiffs' diligence. The long delay in hearing the motions to dismiss or for summary judgment--and ruling on plaintiffs' Rule 56(f) affidavit--was occasioned entirely by month to month sua sponte postponements by the district judge (A 77-78).

In an effort to expedite hearing of these motions, counsel for all parties stipulated that they might be heard by a magistrate. But the Court refused to approve the stipulation (A 77). To suggest that another application to the Court--to obtain discovery during the pendency of summary judgment motions--would receive a more expeditious response than the Rule 56(f) affidavit is a more hopeful speculation than the record in this case warrants.

The interrogatories which plaintiff-appellants served shortly after the commencement of this action and other ma-

terials[17a] provide as high a degree of issue specificity as is possible for a legal standard as subjective as "actual malice," a concept which is, moreover, undergoing rapid modification and change as the Court's current docket testifies.

On such issues, as Bose explains, "the rule of independent review" by appellate

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[17a] See
(a) the high degree of issue specificity in the interrogatories plaintiffs wanted answered (A 28);
(b) the context of a continuing national controversy over Boeing's disparagment of plaintiffs' professional conduct exemplified in a technically detailed article from a professional journal attached as an exhibit to plaintiffs' opposition to summary judgment (A 44);
(c) the conflict between Boeing affidavits and testimony in other related litigation (A 72-73);
(d) the conflict between the federal agency denial of a "system of records" with a federal register publication describing a "system of records" in which records of this accident were required to be maintained (A 106); and
(e) a deposition in related litigation showing a breakdown in govenment record keeping (A 78).

courts "cannot be delegated to the trier of fact" (Slip Op. at 14). Summary judgment appeals, which are ordinarily a matter of de novo appellate review in any event, certainly cannot dispose of such a sensitive matter by delegation to lower court "discretion." This is doubly improper in this case since the suspicion that attaches to "mechanical adoption of the successful attorney's 'suggested' findings" in a Rule 52(a) appeal is "equally applicable to a Rule 56 appeal," requiring the court to scrutinize such rulings with special care.[18]

3. The Court below held: "The Privacy Act mandates certain requirements for government documents organized in 'systems of records'.... [T]he official files of the incident in this case were not organized

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[18]Garter Bare Co. v. Munsingwear, Inc., 650 F.2d 975, 980 (9th Cir. 1980).

in this fashion, and so fall outside the plain language of the statute. But at least two other circuits, applying the same "plain language" test, have held otherwise.

The District of Columbia Circuit in Albright v. U.S.[19] held that "no record" in subsection (e)(7)--set out at A 98--is not restricted by its c encement (A 96) describing the kind of agencies to which it was applicable as those that maintain "a system of records," the terms being separately defined by subsections (a)(4) and (a)(5) in the Act (A 93).

In Clarkson v. IRS[20] the Eleventh Circuit reexamined and followed Albright as to subsection (e)(7); but declined, out of concern for statutory objectives, to extend the Albright rationale to subsections

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[19]631 F.2d 915 (D.C. Cir. 1980).

[20]678 F.2d 1368 (11th Cir. 1982).

(e)(1) and (e)(5), set out at A 96, 97.

(g)(1)(C), A 99, and (e)(6), A 97-98, here involved, have nothing to do with "retrievability" within a "system of records." The somewhat similarly worded subsection (e)(5), for example, is limited to "records...used by the agency in making any determinations about an individual." Its purpose, according to Clarkson is "to minimize, if not eliminate, the risk that an agency will make an adverse determination about an individual" based on faulty data. But when the risk of an adverse determination has become the fact of one, retrieval is no longer an issue and (g)(1)(C) comes into play. (e)(6) is similarly unconcerned with indexing methodology. It is directed to "disseminating any record about an individual to any person." If the defendant agency has disseminated a record of poor quality to the pub-

lic, what difference does it make that the broadcast record is not part of a "system of records"?

Paragraph (C) of subection (g)(1) is by its terms expressly directed at adverse determinations which result from the failure to maintain "any record" with sufficient accuracy, timeliness and completeness. By what logic, therefore, can a cause of action applicable to "any record" be read to extend only to "any record--contained in a system of records"?

The negative response of the system respecting records of this accident is no defense and calls for an explanation. Within three hours after this accident FAA investigators were busy interviewing Captain Gibson in his hotel room (A 51). A few days later, "FAA and NTSB revealed to the press the discovery that the cockpit voice recorder had been erased"--a cir-

cumstance which, despite its sinister implications to an uninformed public, should have little or no significance in a professional investigation. Such recorders "work on a 30-minute, continually erasing cycle, and the incident occurred some 45 minutes before the flight landed" (A 52). Two years later, after this action was filed, the "investigation" was still in progress and still drawing national TV coverage for the NTSB.

In this context, how should the Court receive the affidavit of FAA's assistant chief counsel that after a search of the system in which records of this notorious investigation belong, "there are no such records contained in the system"? Such a response raises far more questions than it answers. To the obvious question of "why?" must be added some highly specific inquiries about defendants' complaince with the

Privacy Act.

Subsection (e)(4), A 97, requires annual publication in the Federal Register of a detailed description of all systems of records maintained by an agency. According to the published description of defendants' "General Aviation Aircraft Accident System" (A 106), it should contain "reports of accident investigation," "engineering analysis, witness statements, investigations analysis" and "pictures of the accident scene" concerning the 841 incident. One of the routine uses of the system is "to identify and monitor airmen involved in accidents," and the data is retrievable "by name, date of birth, and sex, social security numbers, airmen numbers and accident numbers." If any part of this description is incorrect, defendants have violated subsection (e)(4) of the Privacy Act. If the description is correct

but the information is not retrievable as proclaimed, then defendants have violated subsection (e)(5) of the Privacy Act.[21]

Furthermore, since the missing data played a part in a determination of probable cause adverse to plaintiffs, such utilization itself required integration of all supporting data into defendants' system.[22] The negative response of defenddants' system also raises questions about evasions of the Privacy Act through subdividing or organizing a system "so that information which would otherwise have been subject to the Act is no longer subject to the Act. For example...a separate index file to retrieve records by name."[23]

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[21]Chapman v. NASA, 682 F.2d 526, 528-530 (11th Cir. 1982).

[22]Ibid.

[23]OMB Guidelines, 40 F.R. at 28963, quoted in Clarkson v. IRS, 678 F.2d 1368 (11th Cir. 1982), p. 1377, note 15.

4. The exercise of this Court's certiorari jurisdiction is seriously burdened by the assertion of what amounts to discretionary review authority by three prior tribunals--an administrative agency and two courts--who, in the name of expedition, have denied evidentiary hearings without adequate explanation of their reasons.

Despite the notoriety of this case, the flight deck crew have been repeatedly denied access to any public forum where they could explain their own conduct and cross-examine the faceless Boeing experts who have charged them with unprofessional conduct.

Each time they have been denied a forum, denial has been based on the desireability of "summary proceedings." Thus, in the name of expedition, they were denied participation (over a dissent) in

the NTSB proceedings (A 57); then, under the rubric of "summary judgment," they were denied a jury trial in their defamation action--without being allowed any discovery. Finally, in the name of expedition, these prior denials have been summarily approved by an appellate court in a legal memorandum that cannot be published.

Summary dispositions of this kind give neither the appearance nor do they yield the substance of quality decisions, especially in the cumulative effect of adding one summary procedure to another. See Professors Reynolds and Richman article reaching these conclusions, "An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform, 48 U. Chi. L. Rev. 573, 584.

There is an ancient common law remedy: more jury trials and fewer trials on af-

fidavits. This case perfectly illustrates the point. Three denials of a public forum have not quieted suspicions but fired them, and what was said by Learned Hand in Bozant v. Bank of N.Y., 156 F.2d 787, 790 (2d Cir. 1946) is peculiarly applicable here.

> In conclusion we cannot avoid observing that the case is another mistaken effort to save time by an attempt to dispose of a complicated state of facts on motion for summary judgment. This is especially true when the plaintiff must rely for his case on what he can draw out of the defendant....It appears to be somewhat difficult to persuade the district courts of this, but we are satisfied that it is true.

CONCLUSION

This Court should therefore grant the writ of certiorari. After review the case should be reversed and remanded for a thorough exploration of the issues through

discovery, after which defendants' summary judgment motions may be considered in light of the data uncovered in the discovey process.

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